

## **JUDICIAL PROTECTION OF THE RIGHTS OF THE VICTIM (BANK-CREDITOR) AFTER THE CONCLUSION OF THE AGREEMENT OF ASSIGNMENT OF THE RIGHT (REQUIREMENTS) IN THE CONDITIONS OF THE INTENTIONAL BANKRUPTCY OF THE DEBTOR**

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The subject of analysis in the paper is Russian insolvency legislation? As well as rules of Russian Criminal Code about insolvency crimes.

The purpose of the article is to analyze methods of the judicial protection of the rights of the victim (creditor-bank) after the conclusion of the contract of cession of rights (claims) in the context of deliberate bankruptcy of the debtor.

The methodology of research includes: analysis, synthesis, induction, deduction, survey, and statistical method.

The results, scope of application. Intentional bankruptcy (Article 196 of the Russian Criminal Code) violates the legitimate property interests of creditors. In particular, the Bank has the right to appeal to law enforcement agencies with a statement about criminal acts committed against the Bank that caused damage to the Bank. The creditor has the right to apply for recognition as an injured person. Such a creditor is harmed by a crime. In the event that the Bank deliberately bankruptcy of the debtor harmed, and there is a causal relationship between such actions and the socially dangerous consequences that have occurred, then, as follows from Part 1 of Art. 44 of the Code of Criminal Procedure, this circumstance is a prerequisite for the recognition of the Bank as a civil plaintiff. Such a bank has the right to declare in the criminal case a civil claim for damages to the bank. The purpose of this article is to provide judicial protection of the rights of the victim (creditor bank) after concluding the contract of assignment of the right (claims) in the circumstances of the debtor's deliberate bankruptcy. The research methods are: analysis, synthesis, induction, deduction, questioning and statistical method. The conclusion is drawn that the assignment of claims under a civil law contract is not grounds for refusing to recognize the Bank as a victim and a civil plaintiff in a criminal case under Art. 196 of the Criminal Code.

**Conclusion** The assignment of claims under civil contract is not a ground for refusing recognition Bank the victim and civil plaintiff in a criminal case under article 196 of the criminal code.

**Key words:** deliberate bankruptcy, assignment of claims, creditor, bank, debtor, civil claim, criminal law relations

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### **1. Intentional bankruptcy as a legal fact generating civil and legal and criminal law relations.**

The receipt and provision of various loans and conclusion of all kinds of transactions are components of the economic life of any business entity that has a great deal of freedom of action.

However, one must be clearly aware of his responsibility for the property interests of partners and for the observance of their rights and freedoms [1, p. 28].

The legal status of the participants of civil turnover, the grounds of the origin and the procedure of exercising the property right and other proprietary rights, exclusive rights to the results of intellectual activity (intellectual property), contractual and other obligations, as well as other property and related personal non-property relations, is regulated by civil law (Part 1, Clause 1, Article 2 of the Civil Code), but not criminal.

Mandatory conditions of realization of the right of the bank to appeal to the law enforcement authorities [1, p. 7] with the statement about criminal actions made by unknown persons against the bank that resulted in damage to the bank are:

1) adequate evidence testifying that supposed persons representing the interests of the shareholders of the debtor company were associated with the conclusion of deliberately losing trades, a concerted action by the artificial creation of the debt of the bank's debtor, for his deliberate bankruptcy, obviously entailing his insolvency in payment of accounts under the contract;

2) availability of proof of damage and the rationale for its size for a criminal case on grounds of crime under Art. 196 of the Criminal Code of the Russian Federation.

That is, this property crime is at the same time a fact that generates civil liability as a result of harm and criminal law relations [2, p. 274]. Committing a crime causing by the head of the organization damage to the creditor generates the basis for the emergence of criminal liability (Article 8 of the Criminal Code of the Russian Federation). The basis for criminal liability, in accordance with the provisions of Art. 8 of the Criminal Code of the Russian Federation, is the commission of an act containing all the elements of a crime under the Criminal Code of the Russian Federation.

Judicial practice in this category of criminal cases showed that the creditor's applications led to the initiation of criminal cases in 28.6% of cases.

Thus, documents served in a law enforcement agency confirmed that a group of persons (the Chairman of the Board of Directors, the Director, the Board of Directors et al.) committed intentional actions that caused particularly large damage in the amount of \$ 1 billion. rub., formed after the entry into force of the assignment of rights (claims) in 2012, according to which the rights belonging to the bank claims arising from the discovery of non-revolving line, were transferred to the "B" LLC.

The deal should be considered as committed with losses when transactions had been initially calculated for a lower income compared to the costs [5, p. 217-218; 6, p. 13].

The above mentioned persons in 2008-2010 deliberately made key decisions about the illegal withdrawal of value of property and commercial real estate. They concluded forged civil law contracts, including loans and cessions and redirected financial PJSC flows to accounts of management companies. As a result of harmful transactions, including costs that did not meet property status of the debtor they formed a "residual" company which had in the asset "balance" of illiquid assets. They created a deliberate failure of PJSC to fully satisfy the claims of creditors on monetary obligations and (or) to fulfill the obligation to make compulsory payments.

Thus a causal link between intentional criminal acts that preceded the establishment of insolvency, the said persons and the consequences has resulted in property damage to the lender. This damage was to reduce the amount of assets required to meet the debt of the creditor claims [7, p. 398].

Based on the nature of the committed acts of professional experience in management positions, the said persons anticipated offensive not only bankruptcy but also consequent especially large damage or other grave consequences [6, p. 13].

Thus, the bank has the right to appeal to the law enforcement bodies with the statement about criminal acts committed by unknown persons that caused the damage in the amount of 1 billion Rub. Only criminal proceedings can establish the true events that characterize these persons (PJSC) is the perpetrator - director and / or founder of a legal entity, set the attributes of

the subjective side structure of intentional bankruptcy crime, as well as to determine the end of such criminal acts - damage to The period before the expiration of which the debtor was obliged in accordance with the contract to fulfill the corresponding obligations (under Article 314 of the Civil Code of the Russian Federation).

Since the criminal actions of the debtor are related to its business activities and, therefore, are of a purely economic nature, the concept of "major damage", in fact, would mean the loss of property [8, p. 132; 9, p. 49]. Proceeding from this definition of harm, the damage caused to the property rights of creditors is reduced to a reduction of the debtor's property. That is, reducing the debtor's own assets, in essence, is the infringement of the property interests of creditors. Therefore, the criteria for assessing damage should primarily come from the value of property.

Only within the framework of criminal proceedings it is possible to determine the legal facts, from which emerged the claimed property obligations, contributing to the criminal-law relationship is not between the creditor which is the bank and the debtor which is PJSC but between the injured party which is the bank and subjects of deliberate bankruptcy who are the leaders PJSC.

The need to prosecute those who caused damage to the property of the bank arises due to the fact that the illegal handling of another's property for the benefit of these persons was made not on the basis of a contract signed by the parties, as a result of the crime of intentional bankruptcy, which is necessary to establish during the preliminary investigation. Causing harm to the said amount must be set of collected evidence [10, p. 17].

## **2. The Bank as a victim in a criminal case of deliberate bankruptcy.**

In the case of a criminal case the bank has the right to apply for recognition of itself as an injured person. According to Art. 1064 of the Civil Code of the Russian Federation (hereinafter - the Civil Code) the harm caused to the person or property of a citizen, as well as harm caused to the property of a legal entity, is subject to compensation in full by the person who caused it.

Causing property damage generates an obligation between the harm-bearer and the victim, as a result of which, on the basis of Art. 15 of the Civil Code of the Russian Federation a person whose right has been violated may claim full compensation for the losses caused to him, unless the law or the contract provides for compensation of losses in a smaller amount.

By virtue of para. 2 Art. 15 of the Civil Code of the Russian Federation losses are understood as expenses that a person whose right was violated, produced or will have to do to restore the violated right, loss or damage to his property (real damage), as well as unearned income that this person would have received under normal conditions of civil turnover, if his right had not been violated (lost profits) [13, p. 16].

The victim of intentional bankruptcy can be recognized as a person who is a creditor of the organization and whom, as a result of such actions, is caused damage (worker, creditor, state, etc.) [14, p. 2; 15, p. 4; 16, p. 460; 17, p. 403-404].

Thus, the commission of a crime generates an obligation from causing harm between the head of the organization and the creditor.

According to item 3 Resolution of the Plenum of the Supreme Court on June 29, 2010 No.17 a person can be recognized as a victim, both at his request and at the initiative of the body in charge of the criminal case, as well as by the court.

Getting the status of the injured party significantly extends the capabilities of representatives of the bank in the investigation of the criminal case. In particular, this gives the right to testify, participate in investigative actions.

Recognition of the bank as a victims case makes the a party of the process, and not just an outside observer.

The victim will be able to insist that the investigative body identifies all the assets of the debtor, allowing to close his debts to the victim and other creditors. In practice, it often happens that the debtor is hiding information about their current assets and debtors, so the process should be carefully studied banking data of the flow of funds on settlement etc.

### **3. Can the assignee be recognized as a victim in a criminal case of intentional bankruptcy?**

The bank is a victim in these criminal relations. Subsequent legal actions of the bank and, in particular, the right to conclude the contract of assignment (requirement) in 2012 with "B" LLC cannot change that status within any public criminal legal relations, and are extremely private and civil character.

The creditor, who acquired the right of claim against the debtor under the cession agreement, could not be recognized as a victim in criminal procedure, since the right of claim by the assignee was acquired after the crime event. The damage from the crime in this case came as a result of the impossibility of realizing the right of the assignor.

At the time of the commission of acts constituting the offense under Art. 196 of the Criminal Code of the Russian Federation "Intentional bankruptcy" (between 2008 and 2011), as well as the onset of socially dangerous consequences, the bank corresponded to signs of the victim for this composition of the crime. Reducing the size of the damage caused by criminal acts of officials of PJSC against the bank and due to assignment agreements (requirements) in 2012 should be considered as acts committed after the crime, which does not affect the qualification of the crime, in particular, the determination of the identity of the victim of intentional bankruptcy, as well as the size of the damage.

Criminal legal relationships as arose and between PJSC and the bank and no civil contract can change these relationships. That is why the Agreement on the assignment of rights (requirements) in 2012 does not affect or change the qualification of the crime in terms of determining the characteristics of the object of criminal encroachment.

### **3. Realization of the procedural rights of the victim**

In accordance with Article 6 of the Criminal Procedure Code of the Russian Federation, a civil claim can be filed for compensation of property harm caused by a crime, which, as follows from Article 42 of the Code, can be filed by the victim's discretion within the framework of the criminal proceedings or civil proceedings in view of the statutory jurisdiction of cases in the court of general jurisdiction or arbitration court.

Realization of the right for compensation by filing a statement of claim in the criminal proceedings is a common occurrence.

According to Art. 44 of the Code of Criminal Procedure a person has the right to file a civil claim for compensation for property damage, if there is reason to believe that this harm is caused to him directly by a crime .

A civil claim is brought to court after the initiation of criminal proceedings, and until the completion of the trial court of first instance within the proceedings of the criminal case. Thus, after the verdict in a criminal case (or rather, even during the end of the investigation) in the court of first instance, the right to file a civil action within criminal proceedings is terminated.

Based on the fact that the assignor is a civil claimant because the crime has caused him damage (an act as an objective side of corpus delicti) and the property damage is caused him directly, it is necessary to recognize the creditor bank as a civil claimant.

In accordance with the first part of Article 44 of the Code of Criminal Procedure of the Russian Federation the civil claimant has the right to demand compensation for property damage caused to him by a crime.

A natural or legal person who in accordance with the Civil Code of the Russian Federation is responsible for the harm caused by the crime is a civil defendant.

### **4. The right to declare a civil action in the case of intentional bankruptcy**

There is legal practice, according to which, the head of the organization is obliged to compensate the damage caused by a crime, regardless of the organization for recovery of debt obligations of the contract or on obligatory payments.

*Since the circumstances of the case number 33-2116 / 2012 of the judicial board on civil cases of the Ulyanovsk Regional Court- the head of the organization was convicted of an illegal loan. During consideration of the case a civil action was declared, in which the bank sought to recover from the head of pecuniary damage in the amount of that debt is the sum of the two loan agreements. In the appeal the debtor asked to reduce to collect from him the sum, arguing that the court did not take into account the fact that according to the decision of the arbitration court debtor had been charged the amount owed by one of the credit agreements. In addition, he pointed out that it will lead to the unjust enrichment of the bank. The court refused, citing the fact that the plaintiff's claims in this case, stick to the obligations owing to injury, not a contract. In addition, the defendant is himself the head, and not the organization (ie different entities), as in accordance with the Civil Code, the damage caused to the property of a citizen shall be compensated in full by the tortfeasor (Art. 1064). Court judgment debtor has been proven guilt in committing a crime, so these circumstances are the basis for the recovery of material damage was to the head of the organization.*

As pointed out by the Constitutional Court in its judgment of 15 July 2009 Number 13-P, the obligation to compensate the damage caused is usually a measure of civil liability, which is applied to the tortfeasor in the presence of the offense, including the damage occurred, the wrongfulness of the behavior of the tortfeasor, the causal link between the unlawful conduct of the tortfeasor and the onset of injury, as well as his guilt.

At the reference to the court, justified the provisions of Art. 1064 of the Civil Code of the Russian Federation in support of the claims submitted for reimbursement by the defendant of harm caused by the crime, while instituting the plaintiff to the defendant the sum is not actually a debt, and transformed to the detriment of [18, p. 55 ] caused by the criminal actions of the head of the debtor (as is the obligation of the injury).

**5. Consequences of the right of assignment (requirement) to victims in the process of preliminary investigation.** The question arises if the bank has the right to be considered a victim and civil plaintiff in the criminal case under Art. 196 CC RF, if in the course of the preliminary investigation claims under civil contract concluded with a legal person had been ceded by the Bank.

There are no possibilities of concession of rights of the victim in criminal procedure, as opposed to, for example measures under Part 8 of Article 42 Criminal Procedure Code of the Russian Federation about succession of individuals whose death was caused by the crime" [20]. The new lender cannot be a victim because there had been no deliberate bankruptcy against him. In this case the bank is the injured party.

Based on the fact that the damage caused by actions aimed at the deliberate bankruptcy was caused to the bank, only the bank can deliver a civil action for damages. An assignment of the status of the victim and civil party is not transferred to the assignee. The assignee may not be recognized as a victim or civil party, since he property damage was not caused directly by a crime (ie, it is not a party in the obligation of the injury).

As follows from the judicial practice in cases of deliberate bankruptcy assignees are not recognized as victims and civil plaintiffs, which has repeatedly been confirmed by the decisions of higher courts.

This fact had been appealed to the Constitutional Court of the Russian Federation, but the Russian Constitutional Court found no grounds for making complaints to the production.

The Constitutional Court of the Russian Federation pointed out that within the meaning of Part 1 of Art. 42 Code of Criminal Procedure, a victim shall be a physical person who has suffered physical, property, non-pecuniary damage, as well as a legal entity in case of damage to his property and goodwill **directly** the socially dangerous acts, on the basis of which a criminal case.

The immediacy of harm, according to the Part 1 of Art. 44 Code of Criminal Procedure is a prerequisite for the recognition of individual or legal entity as a civil plaintiff.

Enabling the protection of property interests in criminal proceedings by civil action to persons who suffered damage to crime itself, it is an option to protect the rights of these persons.

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